92-1667

Supreme Court, U.S.
FILED
APR 14 1993
OFFICE OF THE CLERK

No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

FREDDIE N. JACKSON,
*Defendant- Petitioner,*
v.
UNITED STATES OF AMERICA,
*Respondent.*

On Writ Of Certiorari To
The Sixth Circuit Court Of Appeals

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I.

Whether interpretation of the phrase "factors which tend to support or refute the inference of discrimination necessary to make a prima facie case" imposed on Defendants by the Court of Appeals in *U.S. v. Sangineto-Miranda*, 859 F.2d 1501 (6th Cir. 1988) precludes implementation of the prima facie test as set out by this Court in *Batson v. Kentucky*, 476 U.S. 79 (1986) creating thereby an insurmountable evidentiary burden of proof.

II.

Whether the District Court erred in denying Defendant's Motion for a *Batson, supra*, hearing based on evidence that the Defendant, a black, used nine (9) out of ten (10) peremptory challenges to exclude white veniremen from the petit jury.

## LIST OF ALL PARTIES

FREDDIE N. JACKSON, Defendant-Petitioner

THE UNITED STATES OF AMERICA, Plaintiff-Respondent

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | i |
| LIST OF ALL PARTIES | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | iv |
| LOWER COURT'S OPINION | 1 |
| BASIS FOR JURISDICTION | 2 |
| CONSTITUTIONAL PROVISIONS RELIED UPON | 2 |
| STATEMENT OF THE CASE | 2 |
| THE FEDERAL COURT JURISDICTION | 3 |
| REASONS FOR GRANTING THE WRIT | 4 |
| CONCLUSION | 10 |
| APPENDIX A | 1a |
| APPENDIX B | 13a |

## TABLE OF AUTHORITIES

**CASES:** **Page**

*Batson v. Kentucky*, 476 U.S. 79 (1986) . . . . . i, 4, 6, 8

*Powers v. Ohio*, 499 U.S._____, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) . . . . . 7

*Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) . . . . . 4

*U.S. v. Sangineto-Miranda*, 859 F.2d 1501 (6th Cir. 1988) . . . . . i, 4, 6, 9, 10

**STATUTES:**

18 U.S.C., Section 243 . . . . . 2

21, U.S.C., Section 812 . . . . . 3

21, U.S.C., Section 846 . . . . . 3

28 U.S.C. Sec. 1251(1) . . . . . 2

28 U.S.C., Sec. 1254(1) . . . . . 3

**RULES**

Supreme Court Rule 10(c) . . . . . 2, 3

Supreme Court Rule 12 . . . . . 1

NO. _____

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OCTOBER TERM, 1992

FREDDIE N. JACKSON
*Defendant - Petitioner,*

v.

UNITED STATES OF AMERICA
*Plaintiff - Respondent.*

ON WRIT OF CERTIORARI TO THE
SIXTH CIRCUIT COURT OF APPEALS

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

COMES NOW FREDDIE N. JACKSON, Petitioner herein, by and through his attorney, FREDDIE N. JACKSON, SR., and pursuant to Rule 12, files this Petition for Writ of Certiorari and in support thereof, would show the Court as follows:

## LOWER COURT'S OPINION

The opinion of the Court of Appeals for the Sixth Circuit is unpublished and attached hereto as Appendix A.

## BASIS FOR JURISDICTION

A. The opinion of the Court of Appeals was delivered on January 15, 1993.

B. A suggestion for rehearing en banc was filed on January 27, 1993..

C. Petitioner asks this Court to review a final judgment of a Court of Appeals of the United States. Therefore, this Court has jurisdiction pursuant to 28 U.S.C. Sec. 1251(1) and Supreme Court Rule 10(c).

D. This petition was timely filed on or before April 15, 1993.

## CONSTITUTIONAL PROVISIONS RELIED UPON

1. The Equal Protection Clause of the Federal Constitution's Fourteenth Amendment, and

2. 18 U.S.C., Section 243

## STATEMENT OF THE CASE

On or about August 15, 1991, Defendant-Petitioner, Freddie N. Jackson "Jackson" was indicted by the Federal Grand Jury on one count alleging that:

"On or about October 10, 1990, in the Western District of Tennessee, the defendant, FREDDIE N. JACKSON, did unlawfully, knowingly and intentionally attempt to possess with the intent to distribute approximately 2.3 grams of cocaine base, a controlled substance as

classified by Title 21, United States Code, Section 812 as a Schedule II controlled substance, in violation of Title 21, United States Code, Section 846."

At his arraignment on August 21, 1991, Jackson pled not guilty. A jury was selected on the morning of October 7, 1991, and the trial began on the morning of October 9, 1991, at 9:00 a.m. On October 10, 1991, the jury, after deliberating about four (4) hours, notified the Court that they were hopelessly deadlocked. Some jurors wanted to hear tapes with the accompanying transcripts. Jurors were brought into open Court and tapes played as jurors followed along with transcripts of the taped conversations. After deliberating further, the jury sent another note saying they were hopelessly deadlocked after eight (8) ballots. The Court asked them to "keep trying". Some fifteen (15) minutes later, they returned a verdict of guilty. Judgment was issued on January 6, 1992. Notice of appeal was filed on January 14, 1992. An amended judgment was issued on February 7, 1992. The Court of Appeals for the Sixth Circuit affirmed on January 15, 1993. Petitioner-Defendant filed his writ of Certiorari on or before April 15, 1993.

## THE FEDERAL COURT JURISDICTION

The United States District Court had jurisdiction over the indictment that accused Petitioner on one count of violating Title 21, United States Code, Sections 812 and 846. Petitioner asks this Court to review a final judgment of a Court of Appeals of the United States affirming Defendant's conviction on January 15, 1993. Therefore, this Court has jurisdiction pursuant to 28 U.S.C., Sec. 1254(1) and Supreme Court Rule 10(c).

## REASONS FOR GRANTING THE WRIT

A writ should be granted in this case for two fundamental reasons, the first being the fact that : The once "crippling burden of proof" imposed on Defendants in *Swain v. Alabama*[1] but eased, if not laid to rest, in *Batson v. Kentucky*[2] has been resurrected by the Six Circuit Court of Appeals in *U.S. v. Sangineto-Miranda*[3] in an equally "crippling" form, i.e., the burden of interpretating the phrase "factors which tend to support, or refute the inference of discrimination necessary to make a prima facie case"[4] and the second reason being the fact that: although this Court expressed no views in *Batson, supra*, as to whether the Constitution imposes limits on the exercise of peremptory challenges by defense counsel, the District Court, in the instant case, deemed the striking of white veniremen by defense counsel one of the "factors which tend to refute the inference of discrimination necessary to make a prima facie case."[5]

In the instant case, for example, during jury selection but after the Defense had exercised its ten (10) peremptory challenges and the Prosecution its six (6), the Defense made a timely objection to the fact that the Prosecution used all six (6) of its peremptory challenges to strike black persons from the venire. Before the jury was sworn, the Defense

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1. *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).

2. *Batson*, 467 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)

3. *Sangineto-Miranda*, 859 F.2d 1501 (6th Cir. 1988).

4. *Id.* at 1521.

5. *Id.* at 1521.

requested a *Batson* hearing. After a brief discussion of the "factors which tend to support, or refute the inference of discrimination necessary to make a prima facie case"[6] the District Court denied Defendant's motion, the dialogue thereof being, in pertinent part, as follows:

"MR. DISCENZA: I do need one other thing in the record, and I believe counsel will stipulate that all of their challenges were to white jurors.

"MR. GREEN: In other words, I'm right, but I've challenged the route that you took, is that right?

"THE COURT: That's right.

"MR. GREEN: Because I wouldn't have done it if I had known the defense was going to --

"THE COURT: (Interjecting) Nine out of ten.

"MR. DISCENZA: Nine out of ten.

"THE COURT: For that reason, I will deny the motion."

During Defendant's appeal to the Court of Appeals for the Sixth Circuit, the government argued that "While an examination of this isolated section of transcript, without more, might tend to support the appellant's argument, the appellant would apparently have this Court completely ignore the District Judge's remarks which immediately preceded this conversation:

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6. *Id.* at 1521.

> "Okay, I do not believe a prima facie case has been made, although six of these challenges were to -- six out six were to black jurors, in almost every case, I personally saw a reason to challenge a number of them. But more importantly is the fact that we have a jury that involves six out of twelve jurors who are black, and I just -- given that there were thirteen on there, I just don't find any basis to conclude that a prima facie showing has been made, that the government has raised these challenges because of the race of these jurors.

Although, the Judge seemed to be applying the aforementioned "factors" test dictated by the Sixth Circuit Court of Appeals in *Sangineto-Miranda*,[7] Defendant respectfully plead, in reply, that under *Batson, supra*, Defendant was not compelled to show, as the District Judge had urged, that the government raised its challenges because of the race of the jurors but, instead, Defendant was compelled under *Batson, supra*, to show that the totality of the relevant facts surrounding the Prosecution's exercise of its peremptory challenges against members of the Defendant's race gave rise to an inference of purposeful discrimination. *Batson*, 106 S.Ct. at 1721.

It was apparent that, at the point in the proceedings when the District Judge made the above statement, the Judge had not concluded that the Defendant had not made a prime facie case to warrant a *Batson* hearing. Conversely, at this point, the Judge was extremely equivocal, urging instead that although six (6) out of six (6) of the Prosecution's peremptory challenges were against black jurors, ". . . more importantly . . ." Defendant still ended up with six (6) blacks

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7. 859 F.2d 1501 (6th Cir. 1988).

on the petit jury out of the original thirteen blacks that were on the panel of twenty eight veniremen. Therefore, based on the fact that six (6) black jurors were selected, notwithstanding how the Prosecution had used its peremptory challenges,[8] the Court urged "I just don't find a basis to conclude that a prima facie showing has been made, that the government has raised these challenges because of the race of these jurors." Under *Batson. supra*, the Defendant however was not compelled to show that the government raised these challenges because of the race of the excluded jurors, but only to show that the totality of the relevant facts surrounding the Prosecution's exercise of its peremptory challenges against members of the Defendant's race gave rise to an inference of purposeful discrimination. *Batson*, 106 S.Ct. at 1721.

Immediately following the aforementioned statement by the District Judge, the Judge did in fact find a "basis" to conclude that a prima facie showing had not been made by Defendant, that "basis" being the fact that Defendant challenged nine (9) out of ten (10) white jurors, a fact to which the District Judge responded in the settling declaration:

"For that reason, I will deny the motion."

Therefore, the District Judge unequivocally used the fact that Defendant challenged nine (9) out of ten (10) white veniremen as the "basis" for concluding that a prima facie Batson showing had not been made by Defendant. Therein, the District Court seems to imply that it is more important that the Defendant salvaged six (6) black petit jurors than the totality of the relevant facts surrounding the Prosecution's exercise of its peremptory challenges against the additional

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8. 18 U.S.C., Sec. 243; *Powers v. Ohio*, 499 U.S. _____, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

members of the Defendant's race. This fact raises the inevitable question as to whether, in the instant case, the Defendant's guarantees under the Equal Protection Clause abruptly ceased after six (6) blacks had been impaneled on the petit jury, giving the Prosecution a free hand to peremptorily challenge with impunity the additional black veniremen? In *Batson*, 106 S.Ct. at 1713, this Court states that ". . . the Equal Protection Clause guarantees the Defendant that the State will not exclude members of his race from the jury venire on . . . the false assumption that members of his race as a group are not qualified to serve as jurors . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on . . . the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."

Certainly, the inference raised by the fact that four (4) out of six (6) black jurors challenged by the Prosecution were neither questioned by the Prosecution nor the Defense during voir dire was apparent to the District Judge, who earlier had briefly queried the entire prospective jury panel. The District Judge even commented on two (2) of the six (6) jurors challenged by the Prosecution. Therefore, in peremptorily challenging the remaining black jurors, the Prosecution was obviously compelled to use either the sparse data made evident about the four (4) black jurors during the District Judge's laconic voir dire or the Prosecution used the overt blackness of individual jurors as a "basis" for challenge. Even the Court of Appeals commented in its opinion as follows about the Prosecution's unreasonable challenge of three (3) of the blacks: "There is no obviously apparent race neutral reason in the record as to why the prosecutor would want to exclude potential jurors, Adams, Patton and Lacy." U.S. Court of Appeals Opinion, p. 5a, Appendix A.

Moreover, the Court of Appeals strongly implied in its opinion, p. 6a, Appendix A, that the District Judge erred by using as a "factor which tends to refute the inference of discrimination necessary to make a prima facie case" the fact that Defendant challenged nine (9) out of ten (10) white veniremen as the "basis" for concluding that a prima facie *Batson* showing had not been made. The comment was, in pertinent part, as follows:

> "Finally, the defense used nine of its ten challenges to exclude whites. This factor bears on the inference of discrimination only in cases where the defense is allowed to make all of its peremptories before the prosecution . . . In the present case, however, the parties exercised their strikes simultaneously."

This cogent observation by the Court of Appeals corroborates Defendant's claim as to the "crippling" burden of interpretating the phrase "factors which tend to support or refute the inference of discrimination necessary to make a prima facie case" as dictated by the Court of Appeals in Sangineto-Miranda.[9]

Therefore, a writ should be granted in this case to further ease, if not lay to rest, the "crippling burden" imposed on District Court Judges as well as defense counsel, particularly within the jurisdiction of the Sixth Circuit Court of Appeals, of interpreting the phrase "factors which tend to support or refute the inference of discrimination necessary to make a prima facie case" as dictated by the Court of Appeals in *Sangineto-Miranda*,[10] which conflicts with this Courts

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9. 859 F.2d at 1521.

10. 859 F.2d at 1521.

prima facie test as set out in *Batson* and creates thereby another Swain-like, insurmountable evidentiary burden of proof.

## CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court grant his petition for writ of certiorari, order full briefs and oral argument, issue its views as to whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel, clarify or overrule the "factors" prima facie test in *Sangineto-Miranda*, and reverse and remand this cause to the District Court for a *Batson* hearing or, in the alternative, reverse Defendant's conviction.

Respectfully submitted,
LAW OFFICES OF FREDDIE N. JACKSON SR.

By: _____

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## APPENDIX A

FILED
JAN 15 1993
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**No. 92-5215**

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**UNITED STATES OF AMERICA**
**Plaintiff-Appellee,**

v.

On Appeal from the United States District Court for the Western District of Tennessee

**FREDDIE N. JACKSON,**
**Defendant-Appellant.**

---

**BEFORE:** **KENNEDY** and **BATCHELDER**, Circuit Judges; and **ENGEL**, Senior Circuit Judge.

**PER CURIAM:** Defendant Freddie N. Jackson appeals his jury conviction for attempt to possess with intent to distribute crack cocaine. Jackson was indicted by the Federal Grand Jury for the Western District of Tennessee on August 7, 1991. After a three-day jury trial, the defendant was found guilty of attempted possession of approximately 2.3 grams of cocaine base with intent to distribute, in violation of 21 U.S.C. § 846. Jackson was sentenced to 41 months imprisonment, followed by a three-year term of supervised release. A timely notice of appeal was filed.

I.

The defendant, a deputy official at the Shelby County Jail, was the target of an internal investigation designed to identify those jailers involved in delivering drugs to the inmates in exchange for money. The Sheriff's Department, which was conducting the investigation, recruited informants among inmates as well as persons outside of the jail.

In this case, Theodore Roosevelt Carr, an inmate at the jail, and his wife, Estella D. Carr, worked with the Sheriff's Department. Lieutenant Beverly Jean Archer, who was in charge of the investigation, gave Mrs. Carr imitation crack cocaine, made by the toxicology lab at the University of Tennessee, to give to the defendant, who in turn was to deliver it to Theodore Carr. Mr. Carr had been given noticeable amounts of money to flash around the jail. Upon receiving the "cocaine" from Jackson, Carr would pay him and would then pass it on to Sergeant Dowdy, a deputy jailer, who would return it to Lieutenant Archer.

The sting went according to plan. The defendant agreed to bring something in for Mr. Carr in exchange for $100. Mrs. Carr called the defendant and set up a meeting time and place at which she would give the defendant the "cocaine" to give to Mr. Carr. Mrs. Carr recorded two of her telephone conversations with the defendant. On October 6, 1990, they met at a convenience store parking lot at about 6:00 a.m. Mrs. Carr was wired by the Sheriff's Department when she met the defendant. She testified that she gave him nine rocks of "cocaine" as well as $50. A Lieutenant Jerry Burross and Lieutenant Archer observed the transaction from a surveillance vehicle.

The defendant alleges several errors on appeal. First, he argues that the District Court erred in failing to conduct

a *Batson* hearing after the defendant challenged the government's peremptory challenges against black jurors. Second, the defendant contends that the Court erred in admitting several pieces of evidence. Finally, the defendant argues that his conviction was not supported by sufficient evidence. We **AFFIRM**.

II.

**A *Batson* Hearing**

In *Batson v. Kentucky*, 476 U.S. 79,84 (1986), the Supreme Court held that the Equal Protection Clause forbids the prosecutor from challenging potential jurors solely on the basis of their race. The defendant challenger bears the burden of establishing a prima facie case of discrimination. Once the defendant has made this showing, the burden shifts to the prosecutor to provide a race-neutral explanation for the peremptory challenges. *Id.* at 97; *United States v. McCoy*, 848 F.2d 743, 745 (6th Cir. 1988). A District Court's determination, which turns largely on credibility evaluations, that a defendant has or has not made out a prima facie case of intentional discrimination is owed great deference by a reviewing court. *Batson*, 476 U.S. at 99n.21.

In *McCoy*, this Court set forth the prima facie elements a defendant must satisfy when making a *Batson* challenge: 1) that the defendant is a member of a cognizable racial group; 2) that the prosecutor has exercised peremptory challenges against members of the defendant's race; and 3) that the relevant circumstances raise an inference of purposeful discrimination. *McCoy*, 848 F.2d at 745.

What constitute relevant circumstances sufficient to raise the inference of discrimination has been addressed by both the Supreme Court and this Court. In *Batson*, the

Supreme Court states that illustrative considerations include whether there was a pattern of strikes against jurors of a particular race, as well as the prosecutor's questions and comments during voir dire. In *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1521 (6th Cir. 1988), this Court rejected a per se rule that a showing by the defendant that the government used all its peremptory challenges against blacks, without more, makes out a prima facie case of intentional discrimination. We also directed trial courts to consider additional factors, including

> 1) the racial composition of the initial group seated and the final jury panel sworn; 2) the number of peremptory strikes allowed each side; and 3) the race of those who were struck or excused from the jury panel throughout the voir dire (whether for cause or by a peremptory challenge), the order of strikes, and by whom they were exercised. In an appropriate case, it may also be useful to consider evidence as to the percentage of the "cognizable racial group" in the jury pool, or the racial composition of the district wherein the jury pool is selected.

*Id.* at 1520.

This Court also provided circumstances which tend to either refute or support an inference of discrimination necessary to make a prima facie case. If the final jury has a percentage of minority members that is equal to or greater than the percentage of minority members in the original impaneled jury, that would be a factor tending to refute the inference of discrimination. If the prosecutor exercises the upper limit of the allowed peremptories, this would support the inference. *Id.* at 1521-22. Moreover, "if the defense has

clearly engaged in a pattern of striking non-minority members, that might make an inference of discrimination arising from the prosecution's opposing strikes less tenable." *Id.* at 1522. However, this will be influenced by the specific mechanics of carrying out strikes. *Id.* at 1522 n.15.

The present case raises the same issue as that in *Sangineto-Miranda, i.e.*, whether the district court erred in determining there was no prima facie case established. The fact that the prosecutor used all six of his allowed challenges to exclude six black jurors from the final jury supports an inference of the prosecutor's discriminatory purpose in his exclusions. There is no obviously apparent race neutral reason in the record as to why the prosecutor would want to exclude potential jurors Adams, Patton and Lacy.

However, there were more factors tending to refute the inference of discrimination than those supporting it. The defendant conceded that juror McFadgon (mistakenly referred to as "McVay") was questionable and challenged only five of the government's six strikes under *Batson*. Of those five, the court found that two were properly excused. It noted that "Barbara Reed was a former worker at the Shelby County Jail. James White seemed extremely uninterested in anything, [plus his son was convicted by the prosecutor in this case]." The transcript shows that there were reasons for excluding several other potential jurors.[1] However the court reporter failed to identify these particular jurors who gave that information. It is possible that these statements were

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1. For example, one prospective juror worked for the Sheriff's Department. A female prospective juror was engaged to a man who was a correction officer at the penal farm. Another had a good friend who worked in the public defender's office. During its voir dire, the Court asked whether any juror or members of their family had been involved as a defendant in a drug-related crime. An unidentified female prospective juror answered in the affirmative about her sisters.

made by Adams, Patton or Lacy. Equally as important as these reasons for challenging the excluded black jurors, is the fact that the ultimate jury contained a larger percentage of black jurors than the original pool.[2]

Finally, the defense used nine of its ten challenges to exclude whites. This factor bears on the inference of discrimination only in cases where the defense is allowed to make all of its peremptories before the prosecution. For example, where the defense exercises all of its peremptories to exclude six whites from a venire of six whites and six blacks, there is less reason to infer discriminatory intent when the prosecutor's subsequent strikes fall solely on the remaining blacks. *Sangineto-Miranda*, 859 F.2d at 1522. In the present case however, the parties exercised their strikes simultaneously.

The defendant argues that the District Court erred in that it considered *only* the exercise of challenges by the defense in making its ruling and not other relevant considerations. The defendant bases his argument on the following portion of the voir dire proceeding:

> MR. DISCENZA [Asst. U.S. Attorney]: I do need one other thing in the record, and I believe counsel will stipulate that all of their challenges were to white jurors.
>
> MR. GREEN [Defense Counsel]: In other words, I'm right, but I've challenged the route you took; is that right?
>
> THE COURT: That's right.

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2. The original pool of 28 potential jurors included 13 blacks. The jury selected included six black jurors and six white jurors.

> MR. GREEN: Because I wouldn't have done it if I had known the defense was going to --
>
> THE COURT: Nine out of ten.
>
> MR. DISCENZA: Nine out of ten.
>
> THE COURT: For that reason, I will deny the motion.

Joint App. at 132. Taken out of context, this isolated section of transcript supports the defendant's argument. However, the district judge made the following remarks immediately before the above exchange:

> Okay. I do not believe a prima facie case has been make, although six of these challenges were to -- six out of six were to black jurors, in almost every case, I personally saw a reason to challenge a number of them. But more importantly is the fact that we have a jury that involves six out of twelve jurors who are black, and I just -- given that there were thirteen on [the venire], I just don't find any basis to conclude that a prima facie showing has been made, that the government has raised these challenges because of the race of these jurors.

*Id.* These remarks make it clear that the district judge considered all of the relevant circumstances, including but not limited to the exercise of challenges by the defense in ruling on this issue. In light of the high degree of deference owed the District Court on these matters, we find that the

District Court did not err in concluding that the defendant had failed to raise an inference of purposeful discrimination against potential black jurors on the basis of race.

### B. Admission of Evidence

The defendant challenges the admission of certain exhibits into evidence as reversible error. The decision to admit or exclude evidence is within the sound discretion of the trial court and should be reversed on appeal only for a clear abuse of that discretion. *United States v. Phillips*, 888 F.2d 38, 40 (6th Cir. 1989). Abuse of discretion exists where the reviewing court is firmly convinced that a mistake has been made. *Id.*

#### 1. Imitation Crack Cocaine

The defendant contends that the District Court abused its discretion in admitting the imitation crack cocaine that the defendant allegedly received from Estella Carr and delivered to Theodore Carr, because the chain of custody was not properly established. In *United States v. Levy*, 904 F.2d 1026, 1030 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 974 (1991), this Court held that , "[a]bsent a clear showing of abuse of discretion, challenges to the chain of custody go to the weight of evidence, not its admissibility."

The government presented evidence of where the crack was at all times from the time Lieutenant Archer gave it to Mrs. Carr, until it was ultimately returned to the Lieutenant, who kept it in storage until trial. The Court did not abuse its discretion in admitting the imitation crack cocaine. Any doubts concerning the chain of custody of the exhibit went to its weight and not to its admissibility.

**2. The Telephone Tape (Exhibit 3)**

The admission of tape recordings at trial is within the sound discretion of the District Court. *United States v. Robinson*, 707 F.2d 872, 876 (6th Cir. 1983). To be admissible tapes must be authentic, accurate, trustworthy, audible and comprehensible. *Id.* Abuse of discretion is present only where "the unintelligible portions are so substantial as to render the recording as a whole untrustworthy." *Id.* (citing *United State v. Jones*, 540 F.2d 465, 470 (10th Cir. 1976), *cert. denied*, 429 U.S. 1101 (1977))

Mrs. Carr tape recorded two telephone conversations with the defendant. She accidentally overlapped the recording of the two conversations, so part of the first conversation was lost. There is nothing in the record indicating that the tape was so inaudible as to be unintelligible, and the defense never objected on the basis of inaudibility. The court requested that the tape be stopped, adjustments to the equipment were made and the court allowed the tape to be played to its conclusion. The court instructed the jury to rely on what it heard and not on what the transcripts said. The court made sure that the tape was authentic, audible and trustworthy and therefore did not abuse its discretion in admitting the exhibit.

**3. The Body Wire (Exhibit 4)**

The body transmitter Mrs. Carr wore was connected to a recorder, monitored by Lieutenant Archer, located in a surveillance van. The government played the first portion of this tape and later moved for its admission into evidence without objection from the defendant. Because the defendant did not object below, the court's decision to admit the

recording is reviewable under the plain error standard. *United States v. Causey*, 834 F.2d 1277, 1281 (6th Cir. 1987), *cert. denied*, 486 U.S. 1034 (1988).

After playing the first portion of this tape, the government asked Mrs. Carr to identify the voices on the tape and then moved that the tape be marked for identification only. Not only did the defendant fail to object to the playing of the tape, he also asked that the entire tape be played so that the jury could get the full context of the conversation between Mrs. Carr and the defendant. The prosecutor was willing to play the remainder of the tape for the jury but he believed that much of it was inadmissible. After a discussion outside the presence of the jury, the court decided to mark the tape and the transcripts of the recording for identification only.

The court then stated:

> For the record, we played the tape down to the point where Jackson is attributed to say [sic] I will have him beep you and CI attributed to -- attributed to saying do that. On the transcript there are additional portions that we [sic] not played and anything else on the tape after that point also has not been played up to this point in the trial. I'm going to receive into the record as Exhibit 4 for identification only. If there are portions on the tape that you consider appropriate to play in you case in chief, of course, you may do so, subject to whatever objections that may be raised.

Joint App. at 195-96. No other portion of the tape was played for the jury.

The defendant argues that he was prejudiced because the court allowed the tape to be played without admitting it into evidence. However, an examination of the record shows that the government moved to have it admitted during its examination of Lieutenant Archer. Joint App. at 223. The defense stated that it had no objection to its admission. *Id.* The court was able to make a first hand determination as to the audibility and trustworthiness of the tape, and thus, did not abuse its discretion in admitting the tape. Moreover, the court's admissibility determination doesn't approach plain error.

### C. Sufficiency of the Evidence

Finally, the defendant raises a sufficiency of the evidence challenge to his conviction. The standard of review for these challenges is that the appellate court must uphold the jury's verdict if "after viewing the evidence in the light most favorable to the prosecution *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This Court must draw all reasonable inferences in the government's favor. *United States v. Allen*, 954 F.2d 1160, 1169 (6th Cir. 1992)

A review of the trial testimony quickly indicates that there was sufficient evidence presented from which the jury could conclude that the defendant attempted to possess crack cocaine with the intent to distribute. The defendant's contention to the contrary is without merit.

## III.

Accordingly, the District Court's decision is **AFFIRMED.**

**ISSUED AS MANDATE:** 3/17/93
**COSTS:** No Costs
**FILING FEE .....$**
**PRINTING.....$**
**TOTAL.....$**

A TRUE COPY
Attest:
LEONARD GREEN,
Clerk
By /s/ illegible
Deputy Clerk

**APPENDIX B**

**FILED**
**MAR 9 1993**
**LEONARD GREEN, Clerk**
**No. 92-5215**

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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|---|---|---|
| **UNITED STATES OF AMERICA,** | ) | |
| **Plaintiff-Appellee,** | ) | |
| | ) | |
| **v.** | ) | **ORDER** |
| | ) | |
| **FREDDIE N. JACKSON,** | ) | |
| **Defendant-Appellant.** | ) | |

**BEFORE:** **KENNEDY** and **BATCHELDER**, Circuit Judges; and **ENGEL**, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

/s/ Leonard Green
Leonard Green, Clerk